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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 746

MAYTE C. ROSS,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS OF THE UNITED STATES

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INDEX

Page

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
---	---	---	---	---	---	---	---	---	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	-----

7

1

INDEX

SUBJECT INDEX

	Page
Petition for writ of certiorari	1
Opinion below	1
Jurisdiction	2
Statutes involved (see appendix)	2
Question presented	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5
Appendix—Statutes involved	9

TABLE OF CASES CITED

<i>Cromwell v. Sac County</i> , 94 U. S. 351, 24 L. Ed. 195	7
<i>Mayte C. Ross v. Commissioner</i> , 125 Fed. (2d) 767	8
<i>Sage v. United States</i> , 39 S. Ct. 415, 250 U. S. 33, 63 L. Ed. 828	4, 7

STATUTES CITED

Revenue Act of 1942, Section 121	9
Internal Revenue Code:	
Section 321(b) (1)	9
Section 322	10
Section 1140	11

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MAYTE C. ROSS,

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vs.

THE UNITED STATES,

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**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS OF THE UNITED STATES**

To the Honorable the Supreme Court of the United States:

Mayte C. Ross, an individual, by her attorney, prays that a writ of certiorari issue to review the judgment and order of the Court of Claims of the United States entered February 2, 1948, sustaining the defendant's plea in bar and dismissing the plaintiff's petition for recovery from the United States of \$44,394.34, with interest, on account of the overpayment of Federal income taxes for the years 1935, 1936 and 1937.

Opinion Below

The special findings of fact, conclusions of law and opinion of the Court of Claims (R. 9-14) are unreported but may be found at Paragraph 72, 343, Volume 5, 1948 Edition of Prentice-Hall Federal Tax Service.

Jurisdiction

The judgment and order of the Court of Claims was entered February 2, 1948 (R. 14). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

Statutes Involved

The pertinent sections of the statutes involved are presented in the Appendix, *infra*, pp. 9-11.

Question Presented

Whether plaintiff is entitled, under Section 121 of the Revenue Act of 1942, amending retroactively Section 23 (a) of the Internal Revenue Code and prior Revenue Acts, to maintain an action for the recovery of taxes overpaid under the retroactive relief provisions of said Section 121 of the 1942 Act or whether such action is barred under Section 322 (c) of the Internal Revenue code.

Statement

The Court of Claims made a Special Findings of Fact (R. 9) which may be summarized as follows:

For the years 1935, 1936, and 1937, plaintiff, a resident of Ridgefield, Connecticut, filed her individual income tax returns and reported therein certain taxes due which were duly paid and are not involved herein.

In each of the said returns, plaintiff claimed certain deductions from gross income consisting of amounts paid to her husband as manager of her properties and amounts paid for accounting and legal fees in connection with the management of such properties.

The aforesaid deductions were disallowed by the Commissioner of Internal Revenue on the ground that the expenditures were not ordinary and necessary expenses in-

curred in carrying on a trade or business. Such disallowance resulted in deficiencies for the said years, 1935, 1936, and 1937, in the respective amounts of \$8,969.32, \$15,387.69, and \$10,889.97, which were duly asserted by the Commissioner.

Plaintiff appealed to the Board of Tax Appeals from the determination of the Commissioner as aforesaid, and on April 16, 1941, the Board (in an unreported memorandum opinion) sustained the position of the Commissioner. Upon appeal, the Circuit Court of Appeals for the Third Circuit, on January 23, 1942, affirmed the decision of the Board (125 Fed. (2d) 767), and on May 25, 1942, the Supreme Court denied plaintiff's petition for a writ of certiorari (316 U. S. 685).

On September 2, 1941, plaintiff paid the deficiencies determined by the Commissioner together with interest thereon, as follows:

Year	Tax	Interest	Total
1935	\$ 8,969.32	\$2,895.24	\$11,864.56
1936	15,387.69	4,043.69	19,431.38
1937	10,889.97	2,208.43	13,098.40
Total			<hr/> \$44,394.34

On February 18, 1943, plaintiff, through her counsel, requested the Commissioner of Internal Revenue to reopen and reconsider the disallowance of the deductions, asserting that Section 121 of the Revenue Act of 1942 afforded the relief which she sought. The request was denied by the Commissioner of Internal Revenue by letter dated March 6, 1943, on the ground that the decision of the Board of Tax Appeals had become final.

On July 1, 1943, plaintiff filed a claim for refund of the amount paid for the year 1935, and on July 20, 1943, she filed claims for refund of the amounts paid for the years

1936 and 1937. To each of the claims was attached a statement which was identical in form, with the exception of the amounts claimed as deductions, setting forth the grounds upon which plaintiff relied for the refunds sought. Those grounds, in substance, were that Section 121 of the Revenue Act of 1942 was made retroactive by its specific terms and that such section entitled plaintiff to the deductions which she had claimed in her returns.

The said claims for refund were duly rejected by letter from the Commissioner to the plaintiff dated July 15, 1944.

The deductions claimed in the claims for refund are the same as those considered and rejected by the Board of Tax Appeals.

The Court of Claims sustained the defendant's plea in bar and dismissed the taxpayer's petition on the ground that Section 322 of the Internal Revenue Code barred any action pursuant to the provisions of Section 121 of the Revenue Act of 1942 for the recovery of taxes paid.

Specification of Errors to Be Urged

The court below erred:

1. In sustaining the defendant's plea in bar and dismissing the plaintiff's petition.

2. In failing to hold and decide that Section 121 of the Revenue Act of 1942, c. 619, 56 Stat. 798 amending Section 23 (a) of the Internal Revenue Code created new rights that had not theretofore existed and accordingly that plaintiff's petition asserting the new rights was not barred. *Sage v. United States*, 39 S. Ct. 415, 250 U. S. 33, 63 L. Ed. 828.

3. In failing to decide that the amendment contained in Section 121 of the Revenue Act of 1942 was a retroactive substitute for the provisions of Section 23(a) of the Internal

Revenue Code and that Section 322 (c) of the Code was not a bar to the relief granted by the amendments contained in Section 121 of the 1942 Act.

4. In failing to hold and decide that to apply Section 322 (c) of the Internal Revenue Code as a bar to relief granted by Section 121 of the 1942 Act would be to deprive taxpayers (who were litigants in the Court decisions which Congress sought to modify) of the very benefits which Congress intended for all taxpayers by adopting the amendments contained in the said Section 121 of the 1942 Act.

5. In failing to hold and decide that the questions here involved were not *res judicata* and that Section 322 (c) was not a bar to the plaintiff's claim because the instant case involves a different claim or cause of action than the case decided by the Board of Tax Appeals on April 16, 1941.

6. In failing to hold and decide that substantial rights based upon the 1942 amendment should be upheld and not set aside by technical defenses raised as a bar to equitable relief sought under the amendment.

7. In failing to hold and decide that since plaintiff's claim for refund was filed within two years after the date of payment of her additional taxes for the years 1935, 1936 and 1937, she was entitled to the relief granted by Section 121 of the 1942 Act.

Reasons for Granting the Writ

1. The Court of Claims has decided an important question of Federal tax law, which has not been but should be settled by this Honorable Court.

The question at issue is whether Section 322 (c) can be considered a bar to the relief accorded taxpayers by the amendments contained in Section 121 of the Revenue Act of 1942. This question vitally affects taxpayers who liti-

gated their cases under Section 23 (a) of the Internal Revenue Code prior to the enactment of the retroactive relief provisions contained in Section 121 of the 1942 Act. The relief amendments were enacted by Congress for the benefit of all taxpayers and we believe that to apply Section 322 (c) would deprive litigants whose cases had been decided of the benefits to which other taxpayers are entitled. The instant case, we believe, cannot be considered as an attempted revival of a stale claim because the plaintiff filed her claims for refund within two years after the payment of the taxes here involved (R. 11) and within the statutory period of limitation for the filing of claims as contained in Section 321 (b) (1) of the Internal Revenue Code.

The legislative history of the pertinent Section 121 shows that Congress intended retroactive relief legislation for all taxpayers.

The Congress inserted Section 121 in the Revenue Act of 1942. The Section as enacted is the same as Section 118 of H. R. 7378. In the Report of the Ways and Means Committee, Report No. 2333, 77th Congress, Second Session, at page 46, the purpose is stated:

The existing law allows taxpayers to deduct expenses incurred in connection with a trade or business. Due partly to the inadequacy of the statute and partly to court decisions, non-trade or non-business income expenses are not deductible, although non-trade or non-business income is fully subject to tax. The bill corrects the inequality.

At page 76 the Committee reported in language substantially the same as in the bill:

The amendments made to Internal Revenue Code by this Section are applicable to all taxable years beginning after December 31, 1938. These amendments shall also be effective as if they were a part of the Revenue Act of 1938 or any prior revenue act on the date of its enactment.

In the Senate the number of the Section was changed from 118 to 121 and the numbering of the subsections was changed, but the language of the body of the House Bill was not changed and subsection (e) was enacted to read:

(e) Retroactive amendment to prior revenue acts. For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such revenue act on the date of its enactment.

2. The decision of the Court of Claims conflicts in principle with and fails to follow the decision of this Court in *Sage v. U. S.*, 39 S. Ct. 415, 250 U. S. 33, 63 L. Ed. 828.

In that case this Honorable Court held that a similar relief statute, the Act of July 27, 1912, c. 256, 37 Stat. 240, "created rights which had not existed before" and that the claimant's rights were not barred by the decision in a prior suit by the claimant against the Collector of Internal Revenue. We think that the Revenue Act of 1942, Section 121, created new rights and that the decision against the petitioner under the prior law was not a bar to the newly created rights under which the claim was filed within the statutory period of two years from the time of payment of the taxes specified by Section 321(b) (1) of the Internal Revenue Code. *Sage v. United States*, supra.

3. We think that the decision of the Court of Claims also conflicts in principle with and fails to follow the principles enunciated by this Court on the question of estoppel by judgment in *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195. In that case this Court stated in part as follows:

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was ren-

dered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

If the petitioner here had brought suit against the United States upon the same claim or demand which was decided on April 16, 1941 in the memorandum decision of the Board of Tax Appeals in *Mayte C. Ross v. Commissioner*, affirmed by the United States Circuit Court of Appeals for the Third Circuit, 125 Fed. (2d) 767, certiorari denied, 316 U. S. 685, then we believe that Section 322 (c) of the Internal Revenue Code would have barred the action. However, the action in this case in the Court of Claims was based upon a different claim or demand, viz. the new rights created by Section 121 of the Revenue Act of 1942. The suit was brought against the United States under rights conferred by said Section 121 which had not existed before.

Accordingly we think that the prior decision against the petitioner in *Mayte C. Ross v. Commissioner of Internal Revenue* was not a bar to and did not operate as estoppel by judgment in the suit founded upon the new cause of action under the decision of this Court in *Cromwell v. Sac County*, *supra*.

Counsel for petitioner certifies that in his opinion this petition is well founded and is not interposed for delay.

It is respectfully submitted that this petition should be granted.

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APPENDIX

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 121. NON-TRADE OR NON-BUSINESS DEDUCTIONS.

(a) Deduction for expenses.—Section 23 (a) (relating to deduction for expenses) is amended to read as follows:

.

(2) Non-trade or non-business expenses.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the protection or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

.

(d) Taxable years to which amendments applicable.—The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938.

(e) Retroactive amendment to prior revenue acts.—For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such revenue Act on the date of its enactment.

Internal Revenue Code:

SEC. 321 (b) (1):

(b) Limitation on Allowance.—

(1) Period of limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the

later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

SEC. 322. REFUNDS AND CREDITS.

.

(c) Effect of petition to Board.—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

.

(26 U. S. C. 1940 ed., Sec. 322.)

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

.

(b) Decision affirming or petition for review dismissed.—

• • • • •

(2) Petition for certiorari denied.—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

• • • • •

(26 U. S. C. 1940 ed. Sec. 1140.)

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